(1)

91-2065

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

**STATE OF CALIFORNIA;
VENTURA COUNTY MUNICIPAL COURT;
ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,
PETITIONERS**

v.

**KAREN SUE MORRIS,
RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL D. BRADBURY
District Attorney
County of Ventura
State of California
MICHAEL D. SCHWARTZ
Deputy District Attorney
(Counsel of Record)
800 South Victoria Avenue
Ventura, CA 93009
Telephone: (805)654-3065

Attorneys for Petitioners

8

QUESTIONS PRESENTED

1. May a criminal defendant convicted in state court obtain federal habeas corpus relief by submitting a declaration which presents a version of the facts which the defendant admits is inconsistent with the defendant's sworn testimony at trial, or does the doctrine of judicial estoppel apply to a defendant seeking habeas corpus relief?

2. When defense counsel in a criminal case gives erroneous advice as to the elements of the crime, and the client commits perjury at trial in an attempt to tailor her testimony to the law as misrepresented to her by counsel, does incompetence of counsel excuse the perjury so as to permit the defendant to offer a different version of the facts on federal habeas corpus?

TOPICAL INDEX

QUESTIONS PRESENTED i

PETITION FOR CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION 2

STATEMENT OF THE CASE

A. Trial 2
B. State habeas 3
C. Federal habeas 4

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Judicial estoppel precludes a defendant's statements on habeas corpus which are inconsistent with the defendant's sworn trial testimony 6

II. The doctrine of incompetence of counsel should not be expanded to excuse a defendant's perjury at trial 11

CONCLUSION 12

APPENDIXES

A. United States Court of Appeals: Order and Amended Opinion
B. Superior Court Appellate Department: Opinion and Judgment

(Appendixes continued)

C. California Court of Appeal: Order Denying Transfer
D. California Supreme Court: Order Denying Alternative Writ
E. United States District Court: Report and Recommendation of United States Magistrate
F. United States District Court: Final Report and Recommendation of United States Magistrate
G. United States District Court: Order Partially Adopting and Partially Rejecting Findings, Conclusions and Recommendations of United States Magistrate
H. United States District Court: Judgment
I. United States Court of Appeals: Opinion [Superceded]
J. Statutory Provision

TABLE OF AUTHORITIES

Cases

Avery v. Procunier
(5th Cir. 1985) 750 F.2d 444, 448 10

Coleman v. Thompson
(1991) 501 U.S. ___
115 L.Ed.2d 640, 656
111 S.Ct. 2546, 2554, reh. denied
115 L.Ed.2d 1109
112 S.Ct. 27 8

Davis v. Blackburn
(5th Cir. 1986) 789 F.2d 350, 352 10

Edwards v. Aetna Life Insurance Company
(6th Cir. 1982) 690 F.2d 595, 598 7

Finley v. Attorney General of the State of Arizona
(9th Cir., April 20, 1992) Dock. No. 91-15522
1992 U.S.App.Lexis 8571
(nonpublished opinion) 9

In re Corey
(9th Cir. 1989) 892 F.2d 829, 836 6

In re Ferguson
(1971) 5 Cal.3d 525, 531
96 Cal.Rptr. 594
487 P.2d 1234 8

Johnson Service Company v. Transamerica Insurance Company
(5th Cir. 1973) 485 F.2d 164, 175 6

Konstantinidis v. Chen
(D.C. Cir. 1980) 626 F.2d 933, 939 7

Milgard Tempering, Inc. v. Selas Corporation of America
(9th Cir. 1990) 902 F.2d 703, 716-717 7

Murray v. Carrier
(1986) 477 U.S. 478 9

People v. Brownlee
(1977) 74 Cal.App.3d 921, 932
141 Cal.Rptr. 685 8

People v. Geiger
(1984) 35 Cal.3d 510, 520
199 Cal.Rptr. 45
674 P.2d 1303 8

People v. Long
(1987) 189 Cal.App.3d 77, 84, fn.2
234 Cal.Rptr. 271 4

People v. Morris
(1987) 196 Cal.App.3d Supp. 1
242 Cal.Rptr. 466 1

Russell v. Rolfs
(9th Cir. 1990) 893 F.2d 1033, 1037, cert. denied,
115 L.Ed.2d 1078, 111 S.Ct. 2915 7

Scarano v. Central R. Company
(3d Cir. 1953) 203 F.2d 510 7

Stevens Technical Services v. S.S. Brooklyn
(9th Cir. 1989) 885 F.2d 584, 588-589 7

United States v. Robinson
(7th Cir. 1978) 585 F.2d 274, 279, cert. denied,
441 U.S. 97411 10

United States v. 49.01 Acres of Land
(10th Cir. 1986) 802 F.2d 387, 390 7

Statutes

California Health and Safety Code section 11550
1985 Cal.Stats., Chpt. 3, § 14
1990 Cal.Stats., Chpt. 1096, § 1 2

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2253 5
28 U.S.C. § 2254 4

Rules

Federal Rules of Appellate Procedure, rule 22 5
Ninth Circuit Rule 36-3 9

Miscellaneous

Comment, Precluding Inconsistent Statements:
The Doctrine of Judicial Estoppel
(1986) 80 Nw.U.L.Rev. 1244, 1250, 1253 6

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF CALIFORNIA;
VENTURA COUNTY MUNICIPAL COURT;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
PETITIONERS,

v.

KAREN SUE MORRIS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The District Attorney of the County of Ventura, on behalf of petitioners, respectfully prays that a writ of certiorari issue to review the judgment and amended opinion of the United States Court of Appeals for the Ninth Circuit entered on March 10, 1992. The amended opinion granted habeas corpus relief to respondent, a criminal defendant convicted of a misdemeanor in state court.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court of Ventura County, State of California, which affirmed the conviction and denied habeas corpus relief, was originally reported as *People v. Morris* (1987) 196 Cal.App.3d Supp. 1, 242 Cal.Rptr. 466. However, on March 17, 1988, the California Supreme Court ordered that the Appellate Department opinion not be published.

The original opinion of the United States Court of Appeals for the Ninth Circuit issued September 30, 1991 was reported at 945 F.2d 1456. The amended opinion issued March 10, 1992 is reported at ____ F.2d _____, Slip op. 2369.

All of the above opinions are reproduced in the Appendix hereto.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 30, 1991. On March 10, 1992, the Court of Appeals issued an order denying our petition for rehearing and rejecting our suggestion for rehearing en banc, and issued an amended opinion. The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The applicable version of California Health and Safety Code section 11550 in effect on the alleged date of offense (1985 Cal.Stats, Chpt. 3, § 14, effective 1/29/85) is reproduced in the Appendix. (This section has been amended several times since, most recently by 1990 Cal.Stats, Chpt. 1096, § 1, effective 7/1/91.)

STATEMENT OF THE CASE

A. TRIAL

Defendant, Karen Sue Morris, was charged in a misdemeanor complaint filed on April 23, 1985 in the Municipal Court of Ventura County, State of California, with unlawfully being under the influence of cocaine on April 14, 1985 in violation of California Health and Safety Code section 11550, subdivision (a). The following evidence was produced at the jury trial:

Sheriff's Deputy De Los Santos was a former narcotics investigator, and testified regarding his training and experience regarding cocaine and narcotics. On April 14, 1985, at 2:50 a.m., Deputy De Los Santos was sitting in a patrol car in a closed gas station. Defendant drove into the station, walked up to the deputy, and asked where she was. The deputy noted that her speech was rapid and excited and that she was in an agitated and "hyper" state. He also noted that her pupils were extremely dilated. The deputy asked if she was taking any medication, and she said that she was taking Tylenol with codeine.

During further examination, the deputy measured defendant's pupils at 6.5 to 7.0 millimeters, and found that defendant's pupils did not constrict when light was induced. He measured her pulse at 140 beats per minute. One of her nostrils was extremely irritated and inflamed in the back of the septum area. The other nostril was not inflamed. Based on these symptoms, the deputy had "no question" that the defendant was under the influence of cocaine.

Deputy De Los Santos advised the defendant that she would have to take a urine sample, and that refusal to do so would be used against her in court. She refused to provide the sample.

On cross-examination of the defendant by the district attorney, defendant testified that she had only taken three prescription drugs: Tylenol with codeine (for pain), Fiorinal (for migraine headaches) and penicillin (for an infection). She denied taking anything else.

Defendant was found guilty and placed on probation with terms including 90 days in the county jail. The jail term was stayed pending appeal, and remains stayed.

B. STATE HABEAS

Defendant filed an appeal and a petition for writ of habeas corpus in the Appellate Department of the Ventura County Superior

Court. In support of the habeas petition, defendant filed a declaration by her trial counsel in which he stated that defendant told him that she was under the influence of methamphetamine and Tylenol with codeine at the time of her arrest. He further stated that he had the erroneous opinion that being under the influence of methamphetamine was a violation of Health and Safety Code section 11550, and thus "advised the appellant that since it was an offense to be under the influence of methamphetamine (even though it was not) she should not offer it as a defense to the charges of under the influence of cocaine." (An "anomaly" in the version of section 11550 in effect at the time, which was later corrected, omitted methamphetamine from the list of proscribed drugs. *People v. Long* (1987) 189 Cal.App.3d 77, 84, and fn. 2, 234 Cal.Rptr. 271.)

The Appellate Department affirmed the conviction and denied the habeas petition, ruling that defendant's presentation of false evidence estopped her from belatedly raising the methamphetamine theory.

The California Court of Appeal, Second Appellate District, Division Six, declined to consider the case. (See Order Denying Transfer in the Appendix.) The California Supreme Court denied defendant's Petition for Writ of Mandate, and ordered that the Appellate Department opinion not be published. (See Order Denying Alternative Writ in the Appendix.)

C. FEDERAL HABEAS

Defendant filed a habeas corpus petition in the United States District Court for the Central District of California, which had jurisdiction pursuant to 28 U.S.C. § 2254. In support of the petition, defendant filed her declaration in which she stated that she had taken Tylenol with codeine and methamphetamine, and advised her trial counsel of these facts. She declared that trial counsel never told her that she could testify "freely, or with impunity" regarding her methamphetamine use, so she "refrained from testifying to said use."

United States Magistrate Robert M. Stone issued a Report and Recommendation applying the doctrine of judicial estoppel to preclude defendant from making factual assertions regarding methamphetamine because they were contrary to her sworn testimony at trial. However, the magistrate recommended that habeas corpus relief be granted based on another issue, incompetence of counsel in failing to object to evidence the defendant used cocaine on one prior occasion six years before the charged offense. United States District Judge John G. Davies approved and adopted the magistrate's findings regarding judicial estoppel, but rejected the magistrate's conclusion that counsel's deficient performance regarding the prior use of cocaine mandated habeas corpus relief. Accordingly, the district judge denied the petition for writ of habeas corpus.

Defendant appealed to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 2253 and Rule 22 of the Federal Rules of Appellate Procedure. On September 30, 1991, the court issued an opinion authored by Judge Stephen Reinhardt, reversing the denial of habeas corpus relief. The court held that defendant was not judicially estopped from raising the methamphetamine claim, and remanded to the District Court for an evidentiary hearing.

We filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. On March 10, 1992, the court denied the petition for rehearing, rejected the suggestion for rehearing en banc, and issued an amended opinion which, like the original opinion, reversed the denial of habeas corpus relief.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

JUDICIAL ESTOPPEL PRECLUDES A DEFENDANT'S STATEMENTS ON HABEAS CORPUS WHICH ARE INCONSISTENT WITH THE DEFENDANT'S SWORN TRIAL TESTIMONY

The Ninth Circuit's opinion unjustifiably expands federal habeas corpus to open a fertile new area for collateral relief. Based on the Court of Appeals' opinion, a criminal defendant may testify to one version of the facts at trial and, if that is not successful, try a new and admittedly inconsistent story on habeas corpus. This rule, if allowed to stand, encourages perjury and manipulation of the judicial system.

Judicial estoppel is appropriate where a party has attempted to "manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings... it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake." *Johnson Service Company v. Transamerica Insurance Company* (5th Cir. 1973) 485 F.2d 164, 175, quoted in *In re Corey* (9th Cir. 1989) 892 F.2d 829, 836. In the present case, the court permits the defendant to take divergent sworn positions based, not on fraud, inadvertence or mistake, but on defendant's claimed reliance on the legal advice of counsel.

The policies in support of judicial estoppel include upholding the sanctity of the oath and preventing the risk of inconsistent results. See Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel (1986) 80 Nw.U.L.Rev. 1244, 1250, 1253. These policies are served by precluding a defendant from successively trying out various inconsistent defenses with contradictory sworn statements.

None of the cases relied upon by the Ninth Circuit regarding judicial estoppel involves testimony by a criminal defendant and none

affords a litigant the opportunity to present a new version of the facts after actual perjury in the earlier proceedings. As explained below, all of the cases relied upon in the court's opinion involve a change in legal position, or a change in position which is susceptible to different interpretations, and not deliberate lies under oath such as those involved in the present case.

In *Milgard Tempering, Inc. v. Selas Corporation of America* (9th Cir. 1990) 902 F.2d 703, 716-717, the change in position was regarding the legal interpretation of a contract as to whether it provided for attorney's fees. In *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037, cert. denied, 115 L.Ed.2d 1078, 111 S.Ct. 2915, the state changed its position in federal habeas corpus proceedings as to whether a particular state court remedy was available as a matter of law. In *Stevens Technical Services v. S.S. Brooklyn* (9th Cir. 1989) 885 F.2d 584, 588-589, there was a change in legal position in response to a district court ruling regarding who was liable for a debt, and in what amount. In *Edwards v. Aetna Life Insurance Company* (6th Cir. 1982) 690 F.2d 595, 598, the litigant took inconsistent positions as to whether active tuberculosis which developed three years after leaving military service was "contracted in [the] line of duty." In *United States v. 49.01 Acres of Land* (10th Cir. 1986) 802 F.2d 387, 390, the defendants took inconsistent legal positions as to whether the outcome of an earlier lawsuit would be binding on them. In *Konstantinidis v. Chen* (D.C. Cir. 1980) 626 F.2d 933, 939, the litigant took inconsistent positions as to whether medical malpractice was a contributing cause of injury, or whether the work-related accident was the sole cause of injury. The court noted that "the origin of Konstantinidis' pain and suffering was not within his personal knowledge nor within the knowledge of his attorney." Id. at p. 940. In *Scarano v. Central R. Company* (3d Cir. 1953) 203 F.2d 510, the court applied the doctrine of judicial estoppel to prevent inconsistent claims as to whether the litigant was able to work.

The inconsistencies in each of the cases cited can be characterized as changes in legal position, or in interpretation of facts. Unlike the present case, none of the cited cases involves perjury or a contradiction

as to matters of a purely factual nature within the knowledge of the witness. As a matter of policy, judicial estoppel should prevent successive attempts to obtain an acquittal by offering factually inconsistent versions of basic facts under oath.

The Appellate Department of the Superior Court based its estoppel rationale on state law, citing *People v. Brownlee* (1977) 74 Cal.App.3d 921, 932, 141 Cal.Rptr. 685; *In re Ferguson* (1971) 5 Cal.3d 525, 531, 96 Cal.Rptr. 594, 487 P.2d 1234; and *People v. Geiger* (1984) 35 Cal.3d 510, 520, 199 Cal.Rptr. 45, 674 P.2d 1303. Estoppel thus acts as a procedural bar under state law to state habeas corpus relief.

Under these circumstances, it was inappropriate for the United States Court of Appeals to grant federal habeas corpus relief. As the court held in *Coleman v. Thompson* (1991) 501 U.S. _____, 115 L.Ed.2d 640, 656, 111 S.Ct. 2546, 2554, reh. denied, 115 L.Ed.2d 1109, 112 S.Ct. 27, the independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." The court continued:

"When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. [Citation.] In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner."

The fact that the Court of Appeals in the present case relied upon the possible innocence of the defendant does not distinguish this case from *Coleman*. In *Coleman* as well, the procedural barriers precluded the defendant from litigating potentially meritorious claims which might have overturned the conviction. Consideration of the petition of defendant herein was not necessary to prevent a "fundamental miscarriage of justice" under *Coleman* because justice does not require that a defendant have multiple opportunities to present inconsistent versions of the facts under oath. Nor, as we discuss in the following section, is

the procedural bar excused by incompetence of counsel.

This case involves more than just a procedural default as addressed in *Murray v. Carrier* (1986) 477 U.S. 478. Defendant herein did not simply neglect to raise the methamphetamine defense at the time required by the rules of procedure. Instead, defendant's trial testimony was directly contrary to her present claims.

It is important to note that we do not at all concede that the defendant is "actually innocent," or was under the influence of methamphetamine rather than cocaine. Defendant was afforded the opportunity to testify at the trial. Having chosen to testify, she had the obligation to testify truthfully. No principle of law requires the state to afford the defendant the opportunity to present an inconsistent version of the facts before a second jury. The defendant unsuccessfully and falsely tailored her testimony to what she believed the law to be. The law should not grant her a right, after she discovers an "anomaly" in the law, to pursue a new version of the "facts" which corresponds to what she now believes the law to be.

The present case is not a unique situation. Judge Reinhardt, the author of the Court of Appeals' opinion, has already relied upon it in his dissenting opinion in *Finley v. Attorney General of the State of Arizona* (9th Cir., April 20, 1992) Dock. No. 91-15522, 1992 U.S.App.Lexis 8571 (nonpublished opinion). The defendant in that case sought federal habeas corpus relief from his state court conviction for sexual assault. Judge Reinhardt cited the present case to support his contention that the defendant's trial testimony that he had penetrated the victim during consensual intercourse would not procedurally bar him from attempting to produce evidence on habeas corpus that penetration did not occur. Although this opinion was not designated for publication pursuant to Ninth Circuit Rule 36-3, it is cited, not as precedent, but to demonstrate that the issue of application of judicial estoppel to habeas corpus is not unique to the present case.

Even without the doctrine of judicial estoppel, the Court of Appeals' opinion was counter to established federal habeas corpus law.

As a general rule, habeas corpus does not allow introduction of new evidence which could have been presented at trial. As the court held in *Davis v. Blackburn* (5th Cir. 1986) 789 F.2d 350, 352, and cases cited therein, a habeas corpus petition may not be supported by evidence which could have been discovered by reasonable diligence before the conviction. Here, if we accept defendant's current story that she had ingested methamphetamine, that information was known to her before trial, but she deliberately chose to lie about that fact. Of course it is our position that neither the defense evidence presented at trial nor the methamphetamine story are true, and that defendant was under the influence of cocaine as charged.

The holding in the present case is logically inconsistent with the law which applies when a prosecution witness commits perjury. A claim of perjury by prosecution witnesses will not support a claim on habeas corpus unless the defendant shows that the prosecutor knew or should have known the witness' testimony was false. *United States v. Robinson* (7th Cir. 1978) 585 F.2d 274, 279, cert. denied, 441 U.S. 974; *Avery v. Procunier* (5th Cir. 1985) 750 F.2d 444, 448. It is logically inconsistent to uphold a conviction based on the prosecution's unwitting use of perjured testimony, but allow a defendant to avoid a conviction based on her own perjury. Of course, the prosecution has no control over how the defendant will testify. But the prosecution in this case will be penalized if the conviction is set aside when it is the defendant who committed the misconduct.

In our adversary system, justice includes not only an opportunity for the defendant to present a defense, but an opportunity for the state to convict those who commit crimes. Justice is not served by a system which requires the state to comply with the rules of evidence, including the obligation to present honest testimony, but which permits a defendant to ignore these rules, with the further opportunity for habeas corpus relief if the lies are unsuccessful.

II.

THE DOCTRINE OF INCOMPETENCE OF COUNSEL SHOULD NOT BE EXPANDED TO EXCUSE A DEFENDANT'S PERJURY AT TRIAL

The Court of Appeals concludes that the defendant's perjury at trial is "a direct result of her counsel's incompetence." Slip op., p. 2381. The court reasons that defendant "allegedly made untruthful statements solely because her attorney was ignorant of the law and told her incorrectly that telling the truth would constitute an admission of a crime." Slip op., p. 2380.

What is troubling in this case is the link between the claimed incompetence of counsel and the perjury of the defendant. There is no indication in the record that trial counsel told or otherwise encouraged defendant to commit perjury. The declaration of defense counsel as to the use of methamphetamine was that he told defendant to "not offer it as a defense" (Slip op., p. 2382); he did not tell her to lie under oath if the issue arose. But the court's opinion treats misadvice regarding the law as a license to commit perjury and permits defendants to adapt their sworn version of the facts to correspond to their understanding of what the law is. The underlying assumption of the court's opinion is faulty: that the legal system should allow a defendant to lie depending on what state of the facts the defendant believes is most helpful.

Defendant took a solemn oath to testify truthfully, and had a legal obligation to do so. There is no authority for the alarming proposition that an attorney who gives erroneous advice as to the elements of an offense is somehow responsible for his client's perjury. The Ninth Circuit's opinion expands the doctrine of incompetence of counsel to include, not only deficient performance by the attorney, but illegal conduct voluntarily undertaken by the defendant himself or herself.

The court reasons that justice is not served by holding defendant to her prior false statements. But the precedent established by this case does a greater disservice to the justice system as a whole. If the opinion in this case stands, then a defendant is entitled to several "bites of the apple" based on inconsistent stories given under oath. All that is required is some claimed deficiency as to the advice of trial counsel regarding which defenses are likely to succeed. The perjury, even if not encouraged by counsel, can be blamed on counsel's deficiencies in evaluating possible defenses. This should not be the law.

CONCLUSION

For the reasons stated, we respectfully request that a writ for certiorari issue in this case.

Respectfully submitted,

MICHAEL D. BRADBURY
District Attorney
County of Ventura,
State of California
MICHAEL D. SCHWARTZ
Deputy District Attorney
(Counsel of Record)
800 South Victoria Avenue
Ventura, California 93009
Telephone: (805) 654-3065

May 22, 1992

APPENDIXES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KAREN SUE MORRIS, *Petitioner-Appellant,* v. STATE OF CALIFORNIA; VENTURA COUNTY MUNICIPAL COURT; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellees.*	No. 90-56095 D.C. No. CV-88-2566-JGD ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 1, 1991—Pasadena, California

Filed September 30, 1991
Amended March 10, 1992

Before: Richard H. Chambers, Senior Circuit Judge,
Mary M. Schroeder and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Habeas Corpus

Reversing and remanding a district court judgment denying habeas relief, but affirming findings and conclusions as to cer-

tain issues, the court of appeals held that appellant was not judicially estopped from asserting that she was under the influence of methamphetamine rather than cocaine at the time of her arrest.

Appellant Karen Sue Morris was convicted by a state municipal court jury of being under the influence of cocaine. The district court denied her petition for habeas relief. She argued that she was the victim of ineffective assistance of counsel in that her trial attorney failed to recognize and advise her of a crucial defense—that she was under the influence of methamphetamine and not cocaine at the time of her arrest. At the time of her arrest, being under the influence of methamphetamine was not illegal in California. Counsel had advised her otherwise and advised her not to admit to methamphetamine use. Morris also claimed ineffective assistance of counsel in that her attorney had a conflict of interest because he was simultaneously defending her husband in an unrelated narcotics prosecution. In addition, she claimed that her attorney failed to object to admission of evidence of past cocaine use.

[1] The court did not need to decide in this case whether to adopt the majority or minority view concerning the applicability of the doctrine of judicial estoppel because, in either instance, it would hold that Morris was not barred from asserting that she told her attorney she had ingested methamphetamine prior to her arrest. The court noted that no circuit has ever applied the doctrine to bar a criminal defendant from asserting a claim of innocence. The court held that the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect, regardless of the innocence or guilt of the defendant. [2] Further, judicial estoppel cannot constitute an independent and adequate state ground on which to uphold Morris' conviction. Morris asserted that, but for ineffective assistance of counsel, she would have asserted facts that would have demonstrated her innocence. If her contentions are true, her testimony could not

be used to bar her from asserting her constitutional right to effectiveness of counsel. Therefore, it was appropriate for the court to consider the merits of her claim.

[3] Concerning the merits of the case, Morris' allegations, if proven, would satisfy the two-part test of *Strickland*. [4] Because the district court ruled that Morris was estopped from asserting that she had been under the influence of methamphetamine rather than cocaine, it never inquired into the veracity of her allegations. Therefore, the case was remanded for the district court to conduct an evidentiary hearing on the methamphetamine issue.

[5] However, Morris could not satisfy her burden concerning her allegation that her trial counsel had a conflict of interest because of his simultaneous representation of her husband in an unrelated case. The mere possibility of a conflict of interest was insufficient to support a holding of ineffective assistance.

[6] An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective. [7] Morris failed to overcome the presumption regarding sound trial strategy. Under the circumstances of her case, an effective advocate could have reasonably decided not to object to the prosecutor's questions concerning her prior cocaine use. The court did not need to determine the actual explanation for trial counsel's failure to object, so long as his failure to do so fell within the range of reasonable representation.

COUNSEL

Scott Howard Siegel, Office of General Counsel, Security Pacific National Bank, Los Angeles, California, for the petitioner-appellant.

Michael D. Bradbury, District Attorney, County of Ventura, Ventura, California, Michael D. Schwartz, Deputy District Attorney, Ventura, California, for the respondent-appellee.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The third paragraph of Part II of the opinion filed September 30, 1991, slip op. 13,673, 13,680-81, is deleted and the following is substituted in its place:

> We need not decide in this case whether to adopt the majority or minority view regarding the applicability of the doctrine of judicial estoppel. In either instance, we would hold that Ms. Morris is not barred from asserting that she told her attorney she had ingested methamphetamine prior to her arrest. No circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence, either on direct appeal or on habeas corpus, and we will not do so now. As noted above, the doctrine of judicial estoppel serves the function of preserving the integrity of the judicial process. Where a defendant who claims to be innocent allegedly made untruthful statements solely because her attorney was ignorant of the law and told her incorrectly that telling the truth would constitute an admission of a crime, the integrity of the judicial process is best preserved by permitting the

judiciary to consider her claim. Justice would not be served by holding the defendant to her prior false statements, because to do so would assign a higher value to the "sanctity of the oath" than to the guilt or innocence of the accused. Because the conviction of an innocent person as a result of her lawyer's incompetence constitutes one of the most serious infringements of the integrity of the judicial process, our concerns over compromising the "sanctity of the oath" must yield. The judicial process can more easily survive a rule that precludes the use of judicial estoppel to keep intact convictions of innocent persons than it can a rule that purports to preserve judicial sacrosanctity by leaving wrongful convictions in place as a sanction for lying. The state is free to prosecute Ms. Morris for perjury if it so desires. However, we decline to adopt a rule that would permit her to be punished twice. We hold that the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant.

Judicial estoppel cannot constitute an independent and adequate state ground on which to uphold Ms. Morris's conviction. The Supreme Court has made it clear that federal habeas relief is not barred by an otherwise independent and adequate state ground when "a constitutional violation has probably resulted in the conviction of one who is actually innocent". *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Ms. Morris asserts that had she received effective assistance of counsel, she would have asserted facts that would have demonstrated her innocence. If true, a matter to be determined by the district court on remand, then a constitutional violation — specifically, of her right to effective assistance of counsel — would have probably resulted in the conviction of one who is actually innocent. As

Carrier makes clear, such a conviction cannot stand. Moreover, a defendant may not default a constitutional claim through conduct that occurs as a result of the constitutional violation. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2567 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails."); *Carrier*, 477 U.S. at 488. According to Ms. Morris, but for the ineffectiveness of her counsel, she would not have testified falsely. Viewed in that light, her testimony is a direct result of her counsel's incompetence. If Ms. Morris's contentions are correct, her testimony could not be used to bar her from asserting her Sixth Amendment right to effectiveness of counsel. Accordingly, we proceed to consider the merits of Ms. Morris's claim.

OPINION

REINHARDT, Circuit Judge:

Appellant Karen Sue Morris appeals the district court's denial of her petition for a writ of habeas corpus. In September 1985, Ms. Morris was convicted by a Ventura County Municipal Court jury on one count of being under the influence of cocaine in violation of California Health & Safety Code § 11550(a). She challenges this conviction on the ground that she received ineffective assistance of counsel. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 2253. We reverse and remand to the district court for further proceedings consistent with this opinion, although we affirm certain of the findings and conclusions below.

APPENDIX A

I. FACTS

At 2:00 a.m. on April 14, 1985, Karen Sue Morris and her husband James were driving on one of Southern California's many freeways when their car malfunctioned. Mr. Morris drove off the freeway and turned into a closed gas station to use a pay phone to summon help. Deputy De Los Santos of the Ventura County Sheriff's Department was sitting in a patrol car nearby. While Mr. Morris was using the telephone, Ms. Morris walked over to Deputy De Los Santos to find out where they were. In the course of his conversation with her, Deputy De Los Santos, who was a former narcotics investigator, began to suspect that Ms. Morris was under the influence of cocaine.

Deputy De Los Santos asked Ms. Morris a number of questions, took her pulse rate, and measured her pupil size. Ms. Morris's pulse rate was rapid, she spoke nervously and quickly, and her pupils were "extremely" dilated and did not constrict when Deputy De Los Santos flashed light on them with a medical penlight. Deputy De Los Santos also examined Ms. Morris's nostrils; one was clear but the other was "extremely" irritated and inflamed. He found no cocaine residue in her nostrils, nor did he find cocaine or cocaine paraphernalia on her person or in her car.

Based on his belief that Ms. Morris was under the influence of cocaine, Deputy De Los Santos arrested her and brought her to the sheriff's substation. There, she refused to provide a urine sample for chemical analysis. Deputy De Los Santos then repeated his check of her symptoms. Her pulse rate remained high, her pupils remained dilated, and at one point he noted that her respiration was rapid. Deputy De Los Santos later testified that there was no doubt in his mind that Ms. Morris was under the influence of cocaine.

Ms. Morris was charged by way of Municipal Court complaint with a single count of being under the influence of

cocaine in violation of California Health & Safety Code § 11550(a). She was convicted by a jury and sentenced to 90 days in the County Jail and 36 months summary probation. Her sentence was suspended pending her appeal.

After she exhausted her state remedies, Ms. Morris filed the instant petition for a writ of habeas corpus. She asserted that her conviction was unconstitutional because she was the victim of ineffective assistance of counsel. She argued that her trial counsel was ineffective in three ways.

First, Ms. Morris asserted that her attorney failed to recognize and advise her of a crucial defense — that she was under the influence of methamphetamine and not cocaine at the time of her arrest. Ms. Morris alleged that she informed her trial counsel that she had ingested methamphetamine — and not cocaine — before her arrest. She further alleged that her trial counsel told her that being under the influence of methamphetamine was "just as bad as" being under the influence of cocaine, and that because it was incriminating, he advised her not to admit to methamphetamine use when offering her defense to the charge of cocaine use. In fact, at the time Ms. Morris was arrested and charged, being under the influence of methamphetamine was not illegal in California. Ms. Morris argues that at the very least her counsel had the obligation to research the question before giving her such critically important erroneous legal advice.

Second, Ms. Morris alleged that her trial counsel had a conflict of interest due to his concurrent representation of her husband in an unrelated criminal case involving narcotics. She argued that counsel's failure to call Mr. Morris to the stand to testify on her behalf was a product of this conflict and that she was prejudiced by her husband's failure to testify.

Finally, Ms. Morris alleged that her attorney provided ineffective assistance by failing to object to questions at trial regarding her prior cocaine use. His failure to object, she

argued, resulted in the admission of inadmissible character evidence against her.

The U.S. Magistrate assigned to her case recommended that the district court reject Ms. Morris's first two arguments but grant a writ of habeas corpus based on the failure of her attorney to object to the admission of evidence of bad character. The district court agreed with the Magistrate that Ms. Morris's first two arguments should be rejected, but disagreed that trial counsel's failure to object to the admission of evidence constituted ineffective assistance. Accordingly, the district court denied the writ. Ms. Morris appeals.

II. DISCUSSION

A. Methamphetamine Defense.

Ms. Morris argues that her trial counsel was ineffective in failing to recognize the legality of her alleged use of methamphetamine prior to her arrest, and in advising her not to disclose the methamphetamine use in connection with her defense to the charge of cocaine use. At the least, she says, her counsel should have researched the question before effectively depriving her of her defense to the charge of which she was convicted. The district court rejected this argument on the ground of judicial estoppel. It based its ruling on Ms. Morris's testimony at trial that she had taken only three prescription drugs — Tylenol with codeine, Fiorinal,[1] and penicillin. The trial transcript reflects the following colloquy:

> Prosecutor: Then what you're saying is these symptoms [observed by Deputy De Los Santos] aren't due to amphetamines or some other drug you may have been taking that night? [Defense counsel's objection was overruled and Ms. Morris answered].

[1]Fiorinal is a prescription medication taken for migraine headaches.

Ms. Morris: I feel that my high pulse rate was attributed to being on the freeway and being scared to death and then being treated so unprofessionally by Deputy De Los Santos.

P: Had you béen drinking alcohol that night?

M: No, I had not.

P: Had you been smoking marijuana that night?

M: No, I had not.

P: Had you been taking anything other than the medication that you've described already?

M: All I had taken were the three prescriptions.

P: Okay. Tylenol with codeine, penicillin and the what?

M: Fiorinal.

P: Fiorinal. And that's it?

M: That's correct.

Ms. Morris now states that she perjured herself at trial. The district court ruled that the doctrine of judicial estoppel precludes her from subsequently changing her story.

As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991); *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 56 (1990); *Stevens Tech. Servs. v. SS*

Brooklyn, 885 F.2d 584, 588 (9th Cir. 1989). Although this circuit has adopted the doctrine of judicial estoppel, we have not yet determined the circumstances under which it will be applied. *See Milgard Tempering, Inc.*, 902 F.2d at 716; *Stevens Tech. Servs., Inc.*, 885 F.2d at 589. The majority of circuits recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation; only in that situation, according to those circuits, is there a risk of inconsistent results and a threat to the integrity of the judicial process. *See Milgard Tempering, Inc.*, 902 F.2d at 716 (citing *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1981); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)); *Stevens Tech. Servs., Inc.*, 885 F.2d at 588-89. The minority view, in contrast, holds that the doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. *See Milgard Tempering, Inc.*, 902 F.2d at 716 (citing *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). In either case, the purpose of the doctrine is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Russell*, 893 F.2d at 1037 (quoting *Religious Tech. Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)).

[1] We need not decide in this case whether to adopt the majority or minority view regarding the applicability of the doctrine of judicial estoppel. In either instance, we would hold that Ms. Morris is not barred from asserting that she told her attorney she had ingested methamphetamine prior to her arrest. No circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence, either on direct appeal or on habeas corpus, and we will not do so now. As noted above, the doctrine

of judicial estoppel serves the function of preserving the integrity of the judicial process. Where a defendant who claims to be innocent allegedly made untruthful statements solely because her attorney was ignorant of the law and told her incorrectly that telling the truth would constitute an admission of a crime, the integrity of the judicial process is best preserved by permitting the judiciary to consider her claim. Justice would not be served by holding the defendant to her prior false statements, because to do so would assign a higher value to the "sanctity of the oath" than to the guilt or innocence of the accused. Because the conviction of an innocent person as a result of her lawyer's incompetence constitutes one of the most serious infringements of the integrity of the judicial process, our concerns over compromising the "sanctity of the oath" must yield. The judicial process can more easily survive a rule that precludes the use of judicial estoppel to keep intact convictions of innocent persons than it can a rule that purports to preserve judicial sacrosanctity by leaving wrongful convictions in place as a sanction for lying. The state is free to prosecute Ms. Morris for perjury if it so desires. However, we decline to adopt a rule that would permit her to be punished twice. We hold that the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant.

Judicial estoppel cannot constitute an independent and adequate state ground on which to uphold Ms. Morris's conviction. The Supreme Court has made it clear that federal habeas relief is not barred by an otherwise independent and adequate state ground when "a constitutional violation has probably resulted in the conviction of one who is actually innocent". *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Ms. Morris asserts that had she received effective assistance of counsel, she would have asserted facts that would have demonstrated her innocence. If true, a matter to be determined by the district court on remand, then a constitutional violation — specifically, of her right to effective assistance of counsel —

would have probably resulted in the conviction of one who is actually innocent. As *Carrier* makes clear, such a conviction cannot stand. Moreover, a defendant may not default a constitutional claim through conduct that occurs as a result of the constitutional violation. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2567 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails."); *Carrier*, 477 U.S. at 488. According to Ms. Morris, but for the ineffectiveness of her counsel, she would not have testified falsely. Viewed in that light, her testimony is a direct result of her counsel's incompetence. If Ms. Morris's contentions are correct, her testimony could not be used to bar her from asserting her Sixth Amendment right to effectiveness of counsel. Accordingly, we proceed to consider the merits of Ms. Morris's claim.

In support of her allegation that her attorney misinformed her as to the legality of methamphetamine use, Ms. Morris introduced two declarations — her own, and that of her trial counsel. In her declaration, she stated that she had ingested methamphetamine prior to her arrest, and that she had not ingested cocaine. She said that she had informed her trial counsel of that fact, and that he had told her "that being charged with being under the influence of methamphetamines was the equivalent to being charged with being under the influence of 'cocaine.' " The declaration of Ms. Morris's trial counsel makes identical representations. It states: "During the time that I represented both appellant and her husband, they both advised me that appellant was under the influence of methamphetamine and tylenol with codeine at the time of her arrest in the within action. They both denied the allegation that she was under the influence of cocaine at the time of her arrest. These representations were made to me both before, during and after appellants [sic] trial in the within action. . . . I was of the opinion that being under the influence of

methamphetamine or cocaine were each respectively, a violation of Health and Safety Code Section 11550. However, at no time prior to or during appellant's trial did I confirm that being under the influence of methamphetamine was described, or included in, or proscribed by Health and Safety Code Section 11550.[2] . . . I advised the appellant that since it was an offense to be under the influence of methamphetamine (even though it was not) she should not offer it as a defense to the charges of under the influence of cocaine."

[2] In order to demonstrate ineffective assistance of counsel, Ms. Morris must show, first, that counsel's performance was "deficient," and second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance requires "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Ms. Morris's allegations, if proven, would satisfy that two-part test.

First, assuming that the declarations are true, the performance of Ms. Morris's trial counsel was clearly deficient. Once she informed her attorney that she had been under the influence of methamphetamine, and not cocaine, he should have investigated and discovered that being under the influence of methamphetamine was not illegal at the time.[3] Addi-

[2]From the context of the statement it is clear that by saying that he did not "confirm" his opinion, counsel meant that he did not independently verify it. His statement clearly does not mean, as it might in some other context, that he did not confirm his initial view to his client a second time.

[3]Even if being under the influence of methamphetamine had been a crime at the time Ms. Morris was arrested, she was not charged with that crime. Counsel for the State of California admitted at oral argument that it was extremely unlikely that a trial court would have allowed amendments to the complaint after the trial had already started because of the

tionally, his advice to her that methamphetamine use and cocaine use were equally incriminating was far below any "objective standard of reasonableness." *See id.* at 688.

Second, if Ms. Morris's counsel had either been familiar with the law or done his homework and discovered that being under the influence of methamphetamine was not illegal, there is a reasonable probability that the outcome of the trial would have been different. Certainly, had counsel not been "deficient" in the performance of his duties, he would have directed Ms. Morris to testify fully as to the drugs she had ingested prior to her arrest. Then he could have presented expert testimony showing that the effects of methamphetamine use are nearly identical to those of cocaine use. Combined with the complete absence of any physical evidence showing cocaine use, this could well have raised a reasonable doubt in the jury's mind as to Ms. Morris's guilt. If the allegations set forth in the affidavits submitted by Ms. Morris are true, a court could not have confidence that the jury would have reached the result it did nor that the result is a reliable one. Thus, if the facts are as Ms. Morris asserts, she has established ineffective assistance of counsel under *Strickland*.

[3] Because the district court ruled that Ms. Morris was estopped from asserting that she had been under the influence of methamphetamine, it never inquired into the veracity of her allegations. We therefore remand for the district court to conduct an evidentiary hearing on the methamphetamine issue.

---

risk of violating the defendant's right to notice of the charges against her. Further, once tried on the charge of being under the influence of cocaine on the occasion in question, Ms. Morris could not have been tried again for the same act on different charges. This would have constituted double jeopardy. Thus, regardless of the legality or illegality of methamphetamine use, counsel's advice that Ms. Morris not raise her methamphetamine use as a defense to the charge of cocaine use was unquestionably seriously deficient.

APPENDIX A

B. Conflict of Interest.

Ms. Morris next argues that her trial counsel had a conflict of interest because he was simultaneously defending her husband in an unrelated narcotics prosecution. Because of that conflict, she argues, her attorney decided not to call Mr. Morris to testify on her behalf. The result, she claims, was ineffective assistance of counsel.

Ms. Morris raised no objection at trial to her counsel's concurrent representation of her husband and herself. Therefore, in order to establish a Sixth Amendment violation based on a conflict of interest, she must show: (1) that her trial counsel actively represented conflicting interests, and (2) that an actual conflict of interest adversely affected his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Manhalt v. Reed*, 847 F.2d 576, 579 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988).

[4] Ms. Morris cannot satisfy her burden. The mere possibility of a conflict of interest is insufficient to support a holding of ineffective assistance. Rather, "a defendant who raised no objection at trial must demonstrate that an *actual* conflict of interest adversely affected his lawyer's performance." *Id.* (emphasis added). An actual conflict must be proved through a factual showing on the record. *Willis v. United States*, 614 F.2d 1200, 1203 (9th Cir. 1979). As we have explained, "while we cannot indulge in nice calculations about the amount of prejudice which results from a conflict of interest . . . neither can we create a conflict of interest out of mere conjecture as to what might have been shown." *Id.* (quoting *Lugo v. United States*, 350 F.2d 858, 859 (9th Cir. 1965); citing *Carlson v. Nelson*, 443 F.2d 21, 22 (9th Cir. 1971)).

Ms. Morris's bare allegation of a conflict of interest is insufficient to entitle her to an evidentiary hearing on the question. In order to establish an actual conflict of interest she would have had to introduce, at a minimum, an affidavit from

her husband disclosing what he would have said at her trial had he testified. She has introduced no evidence demonstrating that her husband's testimony might have been helpful to her, and that her attorney therefore faced a conflict of interest in determining whether to call him as a witness.[4] Although her brief on appeal is heavy with speculation as to the contents of his unsolicited testimony, her wishful suggestions cannot substitute for declaratory or other evidence. In the absence of any record evidence as to the existence of an actual conflict of interest, the district court was correct to reject her claim that such a conflict existed. *See Willis*, 614 F.2d at 1203.

Under the circumstances of this case, including our conclusion that Ms. Morris's trial counsel faced no actual conflict of interest, counsel's decision not to call Mr. Morris as a witness provides no basis for a claim of ineffective assistance. At a bench conference, counsel explained his decision not to call Mr. Morris as follows:

> He [James Morris] has pending matters of his own and I feel that to put Mr. Morris on the stand would do precisely what [opposing] Counsel wishes it would do and that would open the door to other matters which are irrelevant to this proceeding but would be highly prejudicial to the defendant in this case.

That explanation, viewed in the context of his motion in limine to exclude evidence of a prior arrest of Mr. and Ms. Morris,[5] demonstrates that counsel's decision not to call Mr.

[4]Ms. Morris's counsel's affidavit did state that Mr. Morris told him that the defendant was under the influence of methamphetamine and not cocaine. However, it is clear that counsel would not have asked the husband to testify to that fact in any event because he thought that such testimony would be legally unavailing.

[5]The motion was granted without prejudice to allowing the evidence later for purposes of impeachment.

Morris was a tactical one; had he called Mr. Morris, the prosecution could possibly have linked him, and thereby Ms. Morris, to prior involvement with cocaine. In this instance, "[d]efense counsel's conduct and trial strategy appear to fall within the wide range of reasonable professional representation," and cannot be considered ineffective assistance. *See United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 979 (1985); *see also United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987).

C. Failure to Object to Admission of Evidence of Past Cocaine Use.

During Ms. Morris's cross-examination, the prosecutor asked her if she had ever used cocaine. Her trial counsel did not object. Ms. Morris answered that she had used cocaine once at a party six years earlier, when she was in high school, but that she had never seen or used cocaine since then. She asserts that her trial counsel's failure to object to the prosecutor's questions resulted in the admission of inadmissible and prejudicial character evidence against her. For purposes of discussion, we assume that the evidence was, in fact, inadmissible.

[5] An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective. As noted above, in order to establish ineffective assistance of counsel, a defendant must show that counsel committed "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A defendant seeking to prove ineffective assistance of counsel "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

[6] Ms. Morris fails to overcome the presumption regarding sound trial strategy. Under the circumstances of her case, an

effective advocate could have reasonably decided not to object to the prosecutor's questions. Ms. Morris's admission to a single instance of cocaine use six years earlier, when she was in high school, might well have bolstered her credibility with the jury and helped persuade it that she was not under the influence of cocaine on the night in question. Even if that turned out not to be the case, a tactical decision not to object would have been reasonable at the time it was made. We need not determine the actual explanation for trial counsel's failure to object, so long as his failure to do so falls within the range of reasonable representation. *See United States v. Molina*, 934 F.2d 1440 (9th Cir. 1991). Here, it clearly does. Accordingly, his failure to object did not render his representation ineffective.

III. CONCLUSION

Our holding that Ms. Morris is not judicially estopped from asserting that she was under the influence of methamphetamine rather than cocaine at the time of her arrest requires us to reverse the district court's denial of her habeas corpus petition and remand for an evidentiary hearing regarding that issue. We affirm the court's findings and conclusions as to the two other issues.

REVERSED AND REMANDED; FINDINGS AND CONCLUSIONS AS TO CERTAIN ISSUES AFFIRMED.

APPENDIX B

CERTIFIED FOR PUBLICATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

APPELLATE DEPARTMENT

FILED: September 23, 1987

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Respondents, vs. KAREN SUE MORRIS, Defendant and Appellant.	CASE NO. APP 2112 MUNI CT. NO. MM66601 OPINION AND JUDGMENT
KAREN SUE MORRIS, On Habeas Corpus.	

In what we hope is a case of last impression, a defendant convicted by jury seeks reversal armed with trial counsel's declaration under penalty of perjury that he deprived defendant of a meritorious defense and was, therefore, ineffective counsel. We have concluded that the judgment should be affirmed and the petition for writ of habeas corpus should be denied.

APPENDIX B

Karen Sue Morris was convicted in a jury trial of being under the influence of cocaine. (Health & Saf. Code, § 11550 subd. (a).) Proceedings were suspended and probation was granted upon certain terms and conditions, inter alia, the service of the mandatory minimum 90 days in county jail. On the appeal, she contends: "I. Counsel's representation of both appellant and her husband, a percipient witness to the events surrounding appellant's arrest, created a conflict of interest which seriously undermined appellant's defense. II. Counsel's failure to object to the prosecution's questioning regarding appellant's prior use of cocaine seriously prejudiced appellant's defense and further illustrates the incompetent performance of counsel below."

On the habeas petition, she reiterates the claims on appeal and adds that trial counsel " . . . failed to produce any medical evidence or testimony regarding defendant's normal physical condition . . . ", "failed to subpoena and call as a witness Mr. Morris' prior attorney . . . " and "failed" to adequately research the applicable law with respect to methamphetamine use and being under the influence of controlled substances (Health & Saf. Code, § 11550 subd. (a)).[1]

---

1 Defendant conclusionally refers to other instances wherein she perceives additional "failures" by trial counsel. She has not, however, come forward with any factual support therefor and we need not address the claims. As stated by our California Supreme Court: "[W]e do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned." (*In re Swain* (1949) 34 Cal.2d. 300, 304.) The matter was continued on the appellate calendar to afford defendant the opportunity to provide declarations of any person in support of her habeas petition. The only one tendered was from trial counsel. As is often the case in habeas petitions, the evidence tendered in support thereof is significant for what is not presented. We are not provided with Mr. Morris' declaration and his proposed testimony which defendant claims would have been "crucial" to her defense; the declaration of Ms. Morris' former counsel, or the doctor or other person's declaration as to appellant's "normal physical condition." (See discussion, *infra*).

APPENDIX B

On the appeal, we view the whole record in the light most favorable to the judgment as is required by the familiar rule governing appellate review. (e.g. *People v. Johnson* (1979) 26 Cal.3d. 557, 575-579) At approximately 2:00 a.m. on April 14, 1985, defendant and her husband, James Morris were traveling on the Ventura Freeway when they experienced car trouble. They went into a gas station parking lot to use the telephone. While Mr. Morris did so, defendant approached a Ventura County Sheriff's black and white patrol car which happened to be in the same lot. Defendant asked its occupant, Deputy De Los Santos, the exact location of the gas station to advise the person on the telephone. Deputy De Los Santos, who was on routine patrol, had previously been a narcotics detective, and noticed that defendant displayed symptoms consistent with a person under the influence of cocaine. He thereupon initiated a narcotics investigation and determined that her speech was rapid and nervous, her pupils were overly dilated and that she appeared "hyper". He also observed that her right nostril was inflamed.

During this investigation, Mr. Morris was talking with his own attorney on the telephone who purportedly advised him to tell appellant "not to take any tests".[2] As defendant was being placed under arrest, Mr. Morris "yelled" this advice to her and she thereafter followed it.

At trial, the People introduced evidence as to defendant's physical symptomology which was consistent with a person who was then under the influence of cocaine, her refusal to submit to a chemical test to show the presence or absence of cocaine, and past instances where she had used cocaine. [3]

---

2 This attorney was not the attorney who represented appellant at trial.

3 While the Engrossed Settled Statement is ambiguous on the timing of the introduction of prior use of cocaine by defendant, it is clear that the people introduced such evidence without objection. The Engrossed Settled Statement does say that ". . . [t]he trial court called a bench conference and indicated that it felt that defense counsel's failure to object was ineffective assistance of counsel."

APPENDIX B

By way of defense, defendant testified that she was under the influence of Tylenol with codeine and not cocaine. She also claimed that her physical symptomology, testified to by Deputy De Los Santos, resulted from fear because of the car trouble and surgeries which stemmed from a prior motor vehicle accident. In addition, she claimed that the manner in which her pulse rate was taken, by the deputy's hand on her throat, enhanced her state of apprehension.

As indicated, in support of the petition for writ of habeas corpus, defendant tenders the declaration of her trial attorney. In pertinent part, it provides:

"3. I was also the attorney of record for JAMES MORRIS in the Municipal and Superior Court proceedings in the matter of *THE PEOPLE OF THE STATE OF CALIFORNIA vs. JAMES MORRIS*, Ventura Municipal Court Case Number F4 16960 and Ventura Superior Court Case Number CR 19957, which case was being prosecuted at the same time of appellant's Municipal Court case.

"4. At the time of the appellant's arrest, and at all times subsequent thereto, APPELLANT and JAMES MORRIS were Husband and Wife. JAMES MORRIS was present at the time of events leading up to and including appellant's arrest. Further, the officer who arrested appellant was the same officer that arrested JAMES MORRIS in both his cases.

"5. During the time that I represented both appellant and her husband, they both advised me that appellant was under the influence of methamphetamine and tylenol with codeine at the time of her arrest in the within action. They both denied the allegation that she was under the influence of cocaine at the time of her arrest. These representations were made to me both before, during and after appellant's trial in the within action.

"6. At the time appellant and her husband advised me that at the time of her arrest she was under the influence of methamphetamine and tylenol with codeine and not cocaine, I was of the opinion that being under the influence of methamphetamine or cocaine were each respectively, a violation of Health and Safety Code Section 11550. However, at no time prior to or during appellant's trial did I

did I confirm that being under the influence of methamphetamine was described, or included in, or proscribed by Health and Safety Code Section 11550.

"7. I did not verify my suspicions because I was of the opinion that Health and Safety Code Section 11550 did in fact identify and include methamphetamine as a substance for which it was a criminal offense to be under the influence. However, the true facts are that it was not a criminal offense to be under the influence of methamphetamine pursuant to Health and Safety Code Section 11550 or any other statute at the time of appellant's arrest.

"8. I advised the appellant that since it was an offense to be under the influence of methamphetamine (even though it was not) she should not offer it as a defense to the charges of under the influence of cocaine.

"9. At no time did I advise either appellant or her husband that appellant's husband, a precipient witness to the acts leading up to and including appellant's arrest, could offer testimony that could exculpate appellant of the offense(s) with which she was charged. Further, I did not advise either appellant or her husband of the conflict that existed because of my representing them in each of their respective actions.

"10. This failure to research the status of Health and Safety Code Section 11550 in and of itself deprived appellant of a meritorious defense. When combined with my failure to advise the appellant and her husband of the conflict that existed because I represented them each in their respective actions, appellant was deprived of a meritorious defense."

Appellant's first contention is without merit. Trial counsel's representation of both defendant and her husband did not create a conflict of interest which deprived defendant of a meritorious offense. The election not to call Mr. Morris was a sound tactical decision in light of the trial court's informal ruling that he could be cross-examined on his expertise concerning possession, sale, and use of both cocaine and methamphetamine. It is beyond question that the prosecution had such evidence as Mr. Morris was then being

prosecuted in two felony cases. Such evidence most certainly would have shown that defendant had access to the very type of drug which the People claimed was having an effect upon her central nervous system: cocaine. Thus, Mr. Morris' testimony quite obviously would have presented severe risk to the defense.

"'To sustain a claim of inadequate representation by reason of failure to call a witness, there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him. [Citation.]' (*People v. Hill, supra*, 70 Cal.2d 678, 690.) Even if it is assumed that the testimony of the . . . witnesses was material, necessary, or admissible, defendant's contention must fail because he has not shown that this trial counsel used improper judgment. As observed in *Floyd* [*People v. Floyd* (1970) 1 Cal.3d 694], '. . . the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics. . . . However, the choice of which, and how many, of potential witnesses is precisely the type of choice which should not be subject to review by an appellate court.' (1 Cal.3d at p. 709) 'Except in rare cases an appellate court should not attempt to second-guess trial counsel.' (*People v. Brooks*, 64 Cal.2d 130, 140 [48 Cal.Rptr. 879, 410 P.2d 383].)" (*People v. Pena* (1972) 25 Cal.App.2d 414, 430-431.) [4]

Even if we were to assume the best possible hypothetical scenario for defendant, that Mr. Morris was represented by separate counsel, it seems beyond question that that attorney would have

---

4 This rule disposes of defendant's claims concerning the "failure" to call Mr. Morris' prior attorney, produce medical or other evidence relating to her normal physical condition. We also observe that the jury was advised that defendant did not provide a urine sample on advice of counsel. Moreover, as indicated in footnote 1, ante, no declarations concerning normal physical condition or medical evidence are here tendered and the claims predicated thereon are speculative.

advised that he not testify and jeopardize his own felony cases then pending. Moreover, we ask a simple question: Just what would Mr Morris say? Would he have testified that defendant was under the influence of Tylenol with codeine *and methamphetamine*, consistent with what he told trial counsel, in which case his testimony would have been inconsistent with defendant's testimony? Or would he too have omitted any reference to methamphetamine because trial counsel advised defendant to "not offer" it as a defense?

Defendant's second contention is also without merit. Neither the record on appeal nor the habeas petition demonstrate that counsel "failed" to object to evidence concerning defendant's prior cocaine use. To characterize an action/ inaction as a "failure" carries the pejorative connotation and begs the question. That defendant and even the trial court have so characterized trial counsel's inaction is not determinative.

In light of the trial court's decision to allow the prosecution wide latitude in impeaching defendant's claim that she was not under the influence of cocaine but innocently under the influence of other drugs, it may well be that trial counsel "elected" not to make the objection because it would have been futile. (See *People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1003.) Trial counsel's detailed declaration makes no reference whatsoever to his not objecting to prior cocaine use. An appellate court should never presume "failure" upon a silent record and instead, should presume "election". As indicated, the record does not show the timing of the introduction of defendant's past use of cocaine (see Footnote 3, *supra*) and we must, consistent with time-honored rules of appellate review, presume that it was offered to rebut defendant's claim that she was under the influence of Tylenol with codeine and that Deputy De Los Santos was mistaken/erroneous in his opinion that she was under the influence of cocaine. Evidence Code section 1101, subdivision (b) and present decisional law provide that evidence of past misdeeds, when otherwise admissible, are permitted to rebut defenses tendered. (See *People v. Benson* (1982) 130 Cal.App.3d 1001, 1005-1008.)

A trial is a search for the truth and to have not allowed such testimony would have been to paint a false evidentiary picture for the jury, i.e., that defendant was a complete stranger to cocaine use and that Deputy De Los Santos was mistaken in his observations and opinion. (See *People v. Zack* (1986) 184 Cal.App.3d 409, 415.)

As indicated, the trial court remarked that the "failure" to object was "ineffective counsel". While the trial court "felt" that counsel should have objected, its observation does not compel the conclusion that such objection would have been sustained. The inference is to the contrary and we look to what the trial court did, not to what it said. "It is judicial action and not judicial reasoning which is the subject of review." *(El Centro Grain Co. v. Bank of Italy* (1932) 123 Cal.App. 564, 567.) Had the trial court truly believed that not objecting was tantamount to being "ineffective counsel" and that the objection would have been well taken, we presume that it would have favorably entertained a motion to strike the testimony, a motion for mistrial, or a motion for new trial. To credit defendant's arguments would mean that the trial court knowingly allowed a miscarriage of justice to occur. Nothing in the cryptic record on appeal or the scant showing in the habeas petition compels this conclusion.

We come then to the thorny question regarding trial counsel's misapprehension of the true status of being under the influence of methamphetamine circa April of 1985 and defendant's trial testimony which was presumably based thereon. We stress at the outset that trial counsel's self-effacing characterization that he deprived defendant of a meritorious defense cannot be deemed controlling. Whether rooted in honest belief or motivated by a misguided attempt to "help" his former client, it is the business of the courts, not counsel, to make such a determination.

This belated theory of defense has as a legal premise the fact that at the time of the commission of the subject offense, it was not a violation of Health and Safety Code section 11550, subdivision (a) to be under the influence of methamphetamine. (*People v. Long* (1987) 189 Cal.App.3d 77, 84-85, and see fns. 1, 2.) Although we point out

that neither the record on appeal nor the habeas petition make a sufficient showing that the symptomology of being under the influence of cocaine and methamphetamine are similar, we assume this to be the case.

Paragraphs five and eight of the declaration, coupled with the testimony of defendant that she was under the influence of Tylenol with codeine *without reference to methamphetamine* is most disturbing. "An attorney who represents a criminal defendant owes to his client a duty to investigate carefully crucial defenses of fact that may be available. (Citations) . . . [A]n attorney owes no duty to offer on his clients behalf testimony which is untrue. (Citations) . . . [A]n attorney may not 'knowingly allow a witness to testify falsely' (citation), noting that of course a person can only be said to 'allow' that which he has the power to prevent (citation). An attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution (citation) as well as severe disciplinary action. (Citation)" (*In re Branch* (1969) 70 Cal.2d 20, 210-211.) It is not our function to definitively decide whether trial counsel's conduct violated the letter and or spirit of the rules articulated in *In re Branch, supra.* We observe, of course, that ". . . the substantive decision . . . as to . . . whether to testify . . . [is] ultimately to be made by the defendant after consultation with counsel. (Citations)" (*People v. McKenzie* (1983) 34 Cal.3d 616, 631, fn. 9: See also *Brooks v. Tennessee* (1972) 406 U.S. 605, 612; 92 S.Ct. 1981; 32 L.Ed.2d 358.) In this sense, trial counsel had no power to prevent her from testifying in any manner she chose. However, the fair import of trial counsel's declaration is that he actually encouraged her to "not offer" testimony that she was under the influence of methamphetamine. "Although counsel must take all reasonable lawful means to attain the objectives of the client, *counsel is precluded from taking steps or in any way assisting the client in presenting false evidence* or otherwise violating the law." (*Nix v. Whiteside* (1986) 475 U.S. ____, ____; 106 S.Ct. 988, 994; 89 L.Ed.2d 123, ____.) We have no hesitation in concluding that advisement to "not offer" testimony relating to methamphetamine

use was tantamount to assisting her in the presentation of false evidence.

In these circumstances, defendant has unclean hands and is in no position to seek reversal of the judgment by reason of misapprehension of the true status of being under the influence of methamphetamine on April 1, 1985. While the defendant may not be chargeable with knowledge of esoteric legal principles, common sense and the ability to comprehend the oath, compel the conclusion that she is chargeable with the duty to tell the truth. Based upon the declaration of trial counsel, it is apparent that defendant was less than candid with the jury. "No appellant can complain of error which he has invited by his own conduct. 'Where a party by his own conduct *induces the commission of error*, he is *estopped* from asserting it as a ground for reversal . . .' (Citation)" (*People v. Brownlee* (1977) 74 Cal.App.3d 921, 932.) This rule is equally apposite where, as here, the defendant significantly contributes to the commission of claimed error by the presentation of false evidence.

As indicated, a trial is a search for the truth. The fair import of defendant's testimony and the effect which she sought to bring to the jury's attention were inconsistent with that goal. Defendant had the ability to testify that she was under the influence of methamphetamine which would have theoretically explained the symptomology noted by Deputy De Los Santos. *If credited*, such testimony, whether truthful or not, would have set her free. She did not so testify. Now she seeks reversal of the judgment and the opportunity to explain to a new jury that her earlier trial testimony was not complete and was, in fact, an attempt to mislead based upon the urging of counsel who labored under the erroneous premise that being under the influence of methamphetamine was also a criminal offense in 1985.

"The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth and where furtherance of the adversary system comes in conflict with the

ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal . . . " (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) "' . . . Our courts are not gambling halls but forums for the discovery of truth.'" (*People v. Geiger* (1984) 35 Cal.3d 510, 520.) Defendant gambled and lost. To grant relief in these circumstances would place a premium on the presentation of false evidence.

The judgment is affirmed. The petition for writ of habeas corpus is denied.

CERTIFIED FOR PUBLICATION

/s/ Yegan
KENNETH R. YEGAN
Judge of the Superior Court
Appellate Department

We concur:

/s/ Robert C. Bradley
ROBERT C. BRADLEY
Presiding Judge of the
Superior Court
Appellate Department

/s/ Frederick A. Jones
FREDERICK A. JONES
Judge of the Superior Court
Appellate Department

DATED: Sep 23 1987

APPENDIX B

Arturo Gutierrez, Judge
Municipal Court County of Ventura

Michael Bradbury, District Attorney, Michael Schwartz, Patricia J. Kelliher, Deputy District Attorneys for Plaintiff and Respondent.

Scott Siegel for defendant, appellant, and petitioner.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

FILED: September 30, 1987

THE PEOPLE,	) No. B030143
	) (Super. Ct. No.
Plaintiff and Respondent,	) APP 2112)
	) (Muni. Ct. No.
v.	) MM66601)
	) (Ventura County)
KAREN SUE MORRIS,	)
	) ORDER DENYING
Defendant and Appellant.	) TRANSFER
	)
	)
In re	)
	)
KAREN SUE MORRIS,	)
	)
on Habeas Corpus.	)
	)

THE COURT:

We have reviewed the opinion of the Appellate Department of the Superior Court of the State of California, County of Ventura, filed September 23, 1987, and certified for publication by said court. We find transfer of the above cause to this court under rule 62(a) of the California Rules of Court to be unnecessary.

APPENDIX D

ORDER DENYING ALTERNATIVE WRIT

S002725 No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FILED: March 17, 1988

KAREN SUE MORRIS, Petitioner

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX, ET AL
Respondents;
PEOPLE, Real Party in Interest

Petition for writ of mandate DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the Appellate Department opinion in the appeal, entitled People v. Karen Sue Morris - In re Karen Sue Morris on Habeas Corpus, Crim. A. 2112, filed September 23, 1987, which appears at 196 Cal.App.3d Supp. 1. (Cal.Const., Art. VI, sec. 14; Rule 976, Cal. Rules of Court.)

/s/ Lucas
Chief Justice

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: May 3, 1990

KAREN SUE MORRIS,	) Civil No.
	) CV 88-2566-JGD(S)
Petitioner,)	
	) REPORT AND RECOMMENDA-
v.	) TION OF UNITED STATES
	) MAGISTRATE ON A
STATE OF CALIFORNIA,	) PETITION FOR A WRIT OF
	) HABEAS CORPUS BY A
Respondent.)	PERSON IN STATE CUSTODY
_____)	

This Report and Recommendation is submitted to the Honorable John G. Davies, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner was convicted in the Municipal Court of Ventura County, California, of being under the influence of cocaine. She was sentenced to ninety days in jail and thirty-six months of summary probation. Execution of her sentence has been stayed pending completion of the present proceedings.

Petitioner has filed a petition for Writ of Habeas Corpus in this Court, claiming that her trial counsel had a conflict of interest, and that

she was denied the effective assistance of counsel because: (1) counsel failed to carefully research the law, thereby depriving her of crucial defenses; and (2) counsel failed to object to the introduction of evidence regarding Petitioner's prior use of cocaine.

DISCUSSION

Conflict of Interest

To establish a Sixth Amendment violation based on a conflict of interest, Petitioner must show: (1) that her attorney actively represented conflicting interests, and (2) that an actual conflict of interest affected her attorney's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980); *Manhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988). Prejudice is presumed if Petitioner makes such a showing. *Cuyler*, 446 U.S. at 349-350, 100 S.Ct. at 1719.

Petitioner claims that her attorney had a conflict of interest because he represented Petitioner's husband in an unrelated narcotics case. Petitioner was the only witness to her husband's narcotics arrest and her husband was the only witness to Petitioner's arrest in this matter. Petitioner alleges that counsel did not call her husband as a witness at trial out of fear that cross-examination could have been damaging to the husband in his pending criminal trial.

Petitioner asserts that her husband's testimony was necessary to her defense, because it would have established the following facts: (1) that Petitioner had used methamphetamine just prior to her arrest; (2) that the police officer who arrested Petitioner was biased against Petitioner because he had also arrested her husband for sale and possession of narcotics when Petitioner was present; and (3) that Petitioner had suffered from eye problems, nervousness, and agitation since her recent car accident.

But it is not clear that her husband's testimony would have helped Petitioner; it is just as likely that his testimony would have been damaging to her. First, Petitioner's husband probably would not have testified that Petitioner had used methamphetamine, because that would have been inconsistent with Petitioner's testimony. Second, while it is true that Petitioner's husband could have testified about his arrest and

the charges pending against him in order to show the police officer's bias against Petitioner, this testimony would also have been damaging to Petitioner by showing that she had access to cocaine. Thus, trial counsel's decision not to call Petitioner's husband was actually a tactical decision and was not the result of a conflict of interest. This conclusion is confirmed by counsel's explanation at trial as to why he decided not to call Petitioner's husband: "He [Petitioner's husband] has pending matters of his own and I feel that to put Mr. Morris on the stand would do precisely what [opposing] Counsel wishes it would do and that would open the door to other matters which are irrelevant to this proceeding but would be highly prejudicial to the Defendant in this case." (R.T., p. 793) Petitioner has failed to satisfy the *Cuyler* test; therefore, her claim is without merit.

Denial of Effective Assistance of Counsel

1. Failure to Research the Law

Petitioner claims that she was denied the effective assistance of counsel, because counsel failed to properly research the applicable law. Petitioner alleges: (1) that she was under the influence of methamphetamine at the time of her arrest; (2) that counsel misinformed her that it was unlawful to be under the influence of methamphetamine at the time of her arrest, although it was actually legal at that time; (3) that counsel's error resulted in Petitioner's failure to admit at trial that she had been under the influence of methamphetamine, and in counsel's failure to establish at trial that the symptoms of being under the influence of methamphetamine and cocaine are the same. Petitioner testified at trial that prior to her arrest she had consumed only tylenol with codeine, penicillin, and fiorinal. She specifically denied taking *anything* else.

The doctrine of judicial estoppel precludes a party from making a factual assertion in a legal proceeding which is contrary to a factual assertion the party made in the same proceeding or a prior one. *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990); *Stevens Technical Services v. SS Brooklyn*, 885 F.2d 584, 589 (9th Cir. 1989); *Garcia v. Andrus*, 692 F.2d 89, 94 (9th Cir. 1982). "To the extent that prior sworn statements are involved, the doctrine upholds the 'public policy which exalts the

sanctity of the oath.'" *Stevens, supra*, at 589. The doctrine of judicial estoppel is applicable in habeas corpus proceedings. See *Russell v. Rolfs, supra.*

At trial, Petitioner testified to "facts" which are inconsistent with her most crucial present allegations. To grant relief under these circumstances would reward the presentation of false testimony. Petitioner is judicially estopped from asserting that she was under the influence of methamphetamine at the time of her arrest.

2. Failure To Object To Admission of Evidence

Testimony was adduced at trial regarding Petitioner's prior use of cocaine. (C.T. pp. 896-898). Petitioner claims that she was denied the effective assistance of counsel because counsel failed to object to the admission of this evidence.

In order to succeed in a claimed denial of effective assistance of counsel, Petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance resulted in actual prejudice to Petitioner. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *US reh. den.* 467 U.S. 1267 (1984). To meet the requirement of showing prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. 2068; *United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1984), *cert. denied, Moore v. United States*, 474 U.S. 979, 88 L.Ed.2d 335, 106 S.Ct. 381 (1985).

Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole relevance is to show his disposition or propensity to commit the offense charged. California Evidence Code section 1101; *People v. St. Andrew*, 101 Cal.App.3d 450, 161 Cal.Rptr. 634 (1980). The primary purpose of this rule (known historically as the "character rule") is to ensure that a jury will not convict a defendant of a current charge just because he has been a "bad" person in the past. E.g., *People v. St. Andrew, supra*; see also *United States v. Brown*, 880 F.2d 1012 (9th Cir. 1989); *People v. Alcala*, 36 Cal.3d 604, 205 Cal.Rptr. 775 (1984).

APPENDIX E

The sole relevance of the evidence of Petitioner's prior use of cocaine was to raise an inference that since Petitioner had used cocaine in the past, she used cocaine on the night of the arrest. The introduction of this evidence was an improper attempt to establish Petitioner's propensity to use cocaine. It was inadmissible, and should have been objected to by defense counsel.

Respondent argues that evidence of Petitioner's prior use of cocaine showed that the symptoms she exhibited at the time of her arrest could be attributed to cocaine. But this is simply propensity in disguise: i.e., because Petitioner is a bad person who has used cocaine in the past, it is likely that her symptoms on the night of her arrest may be attributed to cocaine use. Moreover, even if a valid argument may be made that the evidence is admissible for the single purpose proposed by the government, defense counsel should have requested, and the trial court should have given, a jury instruction explaining the limited purpose for which the evidence was received. *See United States v. Young*, 573 F.2d 1137, 1141 (9th Cir. 1978) (upholding the use of defendant's prior involvement in narcotics transactions for a special limited purpose when accompanied by jury limiting instructions). This was not done here.

The principal evidence against Petitioner was the arresting officer's visual examination of her conduct and his subjective conclusion that she was under the influence of cocaine. This evidence is far from overwhelming. No other indications of cocaine use were present: Petitioner did not possess any cocaine or cocaine paraphernalia at the time of her arrest, and there was no evidence of cocaine residue on her person. After a review of the entire record of proceedings in the trial court, the Magistrate finds that a reasonable probability exists that but for counsel's deficient performance, the outcome of the proceedings would have been different. Therefore, the Magistrate finds that Petitioner was deprived of her right to the effective assistance of counsel under the Constitution of the United States.

RECOMMENDATION

It is concluded that Petitioner is entitled to a writ of habeas

corpus. The Magistrate recommends that an Order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered requiring that the municipal court judgment and sentence entered against Petitioner be vacated and set aside, without prejudice to the right of prosecuting authorities to refile the charge against her within ninety days of the date of entry of judgment herein.

Dated: May 2, 1990

/s/ R M Stone
ROBERT M. STONE
United States Magistrate

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: June 21, 1990
ENTERED: July 6, 1990

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

KAREN SUE MORRIS,	) Civil No.
	) CV 88-2566-JGD(S)
Petitioner,	)
	) FINAL REPORT AND
v.	) RECOMMENDATION OF
	) UNITED STATES
STATE OF CALIFORNIA, et al.,	) MAGISTRATE
	)
Respondents.	)
	)

This Final Report and Recommendation is submitted to the Honorable John G. Davies, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On May 3, 1990, the clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate's Report and Recommendation.

On May 21, 1990, Respondents filed Objections to the Magistrate's Report and Recommendation. The Magistrate takes

notice that the refiling of the charge against Petitioner is not appropriate because the original complaint is still pending. Therefore, a new proposed judgment is submitted herewith.

CONCLUSION

Having fully considered Respondents' objections, the Magistrate reaffirms the findings and conclusions as set forth in the Report and Recommendation, except as revised herein.

RECOMMENDATION

It is therefore the final recommendation of the Magistrate that an order be issued by the Court: (1) directing that judgment be entered requiring that the municipal court judgment and sentence entered against Petitioner be vacated and set aside, without prejudice to the right of prosecuting authorities to retry Petitioner within ninety days of the date of entry of judgment herein; and (2) approving and adopting the initial Report and Recommendation and this Final Report and Recommendation.

DATED: May 22, 1990

/s/ RM Stone
ROBERT M. STONE
United States Magistrate

APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: June 21, 1990
ENTERED: July 6, 1990

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

KAREN SUE MORRIS,	)
	) Civil No.
Petitioner,	) CV 88-2566-JGD(S)
	)
v.	) ORDER PARTIALLY
	) ADOPTING AND PARTIALLY
	) REJECTING FINDINGS,
STATE OF CALIFORNIA,	) CONCLUSIONS AND
et al.,	) RECOMMENDATIONS OF
	) UNITED STATES
Respondents.	) MAGISTRATE
_____	)

Pursuant to 28 U.S.C. section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the Report and Recommendation and Final Report and Recommendation of the Magistrate, and the objections to the Magistrate's initial Report and Recommendation. The Court has made a de novo determination of those portions of the report to which objection has been made. The Court approves and adopts the Magistrate's findings, conclusions and recommendations, except as follows:

1. The Court rejects the finding of the Magistrate that a

reasonable probability exists that but for trial counsel's deficient performance, the outcome of the proceedings would have been different.

2. The Court makes the following finding: It is not reasonably probable that the outcome of the proceedings would have been different but for trial counsel's failure to object to Petitioner's trial testimony of a single, isolated incident of cocaine use six years prior to trial.

IT IS ORDERED that the petition for writ of habeas corpus be denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Final Report and Recommendation and the Judgment by United States mail on Petitioner and the District Attorney of Ventura, California.

Dated: June 21, 1990

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: June 21, 1990

ENTERED: July 6, 1990

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

KAREN SUE MORRIS,	)	
	)	Civil No.
Petitioner,	)	CV 88-2566-JGD(S)
	)	
v.	)	
	)	JUDGMENT
STATE OF CALIFORNIA, et al.,	)	
	)	
Respondents.	)	

Based on the Court's de novo determination of those portions of the Magistrate's Report to which objection has been made, the petition for writ of habeas corpus is denied.

Dated: June 21, 1990

/s/ John G. Davies
JOHN G. DAVIES
United States District Court

APPENDIX I

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KAREN SUE MORRIS,
Petitioner-Appellant,

v.

STATE OF CALIFORNIA; VENTURA COUNTY MUNICIPAL COURT; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

No. 90-56095
D.C. No. CV-88-2566-JGD
OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 1, 1991—Pasadena, California

Filed September 30, 1991

Before: Richard H. Chambers, Senior Judge,
Mary M. Schroeder and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Habeas Corpus

Reversing and remanding a district court judgment denying habeas relief, but affirming findings and conclusions as to certain issues, the court of appeals held that appellant was not

judicially estopped from asserting that she was under the influence of methamphetamine rather than cocaine at the time of her arrest.

Appellant Karen Sue Morris was convicted by a state municipal court jury of being under the influence of cocaine. The district court denied her petition for habeas relief. She argued that she was the victim of ineffective assistance of counsel in that her trial attorney failed to recognize and advise her of a crucial defense—that she was under the influence of methamphetamine and not cocaine at the time of her arrest. At the time of her arrest, being under the influence of methamphetamine was not illegal in California. Counsel had advised her otherwise and advised her not to admit to methamphetamine use. Morris also claimed ineffective assistance of counsel in that her attorney had a conflict of interest because he was simultaneously defending her husband in an unrelated narcotics prosecution. In addition, she claimed that her attorney failed to object to admission of evidence of past cocaine use.

[1] The court did not need to decide in this case whether to adopt the majority or minority view concerning the applicability of the doctrine of judicial estoppel because, in either instance, it would hold that Morris was not barred from asserting that she told her attorney she had ingested methamphetamine prior to her arrest. The court noted that no circuit has ever applied the doctrine to bar a criminal defendant from asserting a claim of innocence. [2] Concerning the merits of the case, Morris' allegations, if proven, would satisfy the two-part test of *Strickland*. [3] Because the district court ruled that Morris was estopped from asserting that she had been under the influence of methamphetamine rather than cocaine, it never inquired into the veracity of her allegations. Therefore, the case was remanded for the district court to conduct an evidentiary hearing on the methamphetamine issue.

[4] However, Morris could not satisfy her burden concerning her allegation that her trial counsel had a conflict of inter-

est because of his simultaneous representation of her husband in an unrelated case. The mere possibility of a conflict of interest was insufficient to support a holding of ineffective assistance.

[5] An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective. [6] Morris failed to overcome the presumption regarding sound trial strategy. Under the circumstances of her case, an effective advocate could have reasonably decided not to object to the prosecutor's questions concerning her prior cocaine use. The court did not need to determine the actual explanation for trial counsel's failure to object, so long as his failure to do so fell within the range of reasonable representation.

COUNSEL

Scott Howard Siegel, Smith & Smith, Los Angeles, California, for the petitioner-appellant.

Michael D. Bradbury, District Attorney, County of Ventura, Ventura, California, Michael D. Schwartz, Deputy District Attorney, Ventura, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

Appellant Karen Sue Morris appeals the district court's denial of her petition for a writ of habeas corpus. In September 1985, Ms. Morris was convicted by a Ventura County Municipal Court jury on one count of being under the influence of cocaine in violation of California Health & Safety Code § 11550(a). She challenges this conviction on the ground that she received ineffective assistance of counsel.

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 2253. We reverse and remand to the district court for further proceedings consistent with this opinion, although we affirm certain of the findings and conclusions below.

I. FACTS

At 2:00 a.m. on April 14, 1985, Karen Sue Morris and her husband James were driving on one of Southern California's many freeways when their car malfunctioned. Mr. Morris drove off the freeway and turned into a closed gas station to use a pay phone to summon help. Deputy De Los Santos of the Ventura County Sheriff's Department was sitting in a patrol car nearby. While Mr. Morris was using the telephone, Ms. Morris walked over to Deputy De Los Santos to find out where they were. In the course of his conversation with her, Deputy De Los Santos, who was a former narcotics investigator, began to suspect that Ms. Morris was under the influence of cocaine.

Deputy De Los Santos asked Ms. Morris a number of questions, took her pulse rate, and measured her pupil size. Ms. Morris's pulse rate was rapid, she spoke nervously and quickly, and her pupils were "extremely" dilated and did not constrict when Deputy De Los Santos flashed light on them with a medical penlight. Deputy De Los Santos also examined Ms. Morris's nostrils; one was clear but the other was "extremely" irritated and inflamed. He found no cocaine residue in her nostrils, nor did he find cocaine or cocaine paraphernalia on her person or in her car.

Based on his belief that Ms. Morris was under the influence of cocaine, Deputy De Los Santos arrested her and brought her to the sheriff's substation. There, she refused to provide a urine sample for chemical analysis. Deputy De Los Santos then repeated his check of her symptoms. Her pulse rate remained high, her pupils remained dilated, and at one point

he noted that her respiration was rapid. Deputy De Los Santos later testified that there was no doubt in his mind that Ms. Morris was under the influence of cocaine.

Ms. Morris was charged by way of Municipal Court complaint with a single count of being under the influence of cocaine in violation of California Health & Safety Code § 11550(a). She was convicted by a jury and sentenced to 90 days in the County Jail and 36 months summary probation. Her sentence was suspended pending her appeal.

After she exhausted her state remedies, Ms. Morris filed the instant petition for a writ of habeas corpus. She asserted that her conviction was unconstitutional because she was the victim of ineffective assistance of counsel. She argued that her trial counsel was ineffective in three ways.

First, Ms. Morris asserted that her attorney failed to recognize and advise her of a crucial defense — that she was under the influence of methamphetamine and not cocaine at the time of her arrest. Ms. Morris alleged that she informed her trial counsel that she had ingested methamphetamine — and not cocaine — before her arrest. She further alleged that her trial counsel told her that being under the influence of methamphetamine was "just as bad as" being under the influence of cocaine, and that because it was incriminating, he advised her not to admit to methamphetamine use when offering her defense to the charge of cocaine use. In fact, at the time Ms. Morris was arrested and charged, being under the influence of methamphetamine was not illegal in California. Ms. Morris argues that at the very least her counsel had the obligation to research the question before giving her such critically important erroneous legal advice.

Second, Ms. Morris alleged that her trial counsel had a conflict of interest due to his concurrent representation of her husband in an unrelated criminal case involving narcotics. She argued that counsel's failure to call Mr. Morris to the

stand to testify on her behalf was a product of this conflict and that she was prejudiced by her husband's failure to testify.

Finally, Ms. Morris alleged that her attorney provided ineffective assistance by failing to object to questions at trial regarding her prior cocaine use. His failure to object, she argued, resulted in the admission of inadmissible character evidence against her.

The U.S. Magistrate assigned to her case recommended that the district court reject Ms. Morris's first two arguments but grant a writ of habeas corpus based on the failure of her attorney to object to the admission of evidence of bad character. The district court agreed with the Magistrate that Ms. Morris's first two arguments should be rejected, but disagreed that trial counsel's failure to object to the admission of evidence constituted ineffective assistance. Accordingly, the district court denied the writ. Ms. Morris appeals.

II. DISCUSSION

A. *Methamphetamine Defense.*

Ms. Morris argues that her trial counsel was ineffective in failing to recognize the legality of her alleged use of methamphetamine prior to her arrest, and in advising her not to disclose the methamphetamine use in connection with her defense to the charge of cocaine use. At the least, she says, her counsel should have researched the question before effectively depriving her of her defense to the charge of which she was convicted. The district court rejected this argument on the ground of judicial estoppel. It based its ruling on Ms. Morris's testimony at trial that she had taken only three prescription drugs — Tylenol with codeine, Fiorinal,[1] and penicillin. The trial transcript reflects the following colloquy:

[1]Fiorinal is a prescription medication taken for migraine headaches.

Prosecutor: Then what you're saying is these symptoms [observed by Deputy De Los Santos] aren't due to amphetamines or some other drug you may have been taking that night? [Defense counsel's objection was overruled and Ms. Morris answered].

Ms. Morris: I feel that my high pulse rate was attributed to being on the freeway and being scared to death and then being treated so unprofessionally by Deputy De Los Santos.

P: Had you been drinking alcohol that night?

M: No, I had not.

P: Had you been smoking marijuana that night?

M: No, I had not.

P: Had you been taking anything other than the medication that you've described already?

M: All I had taken were the three prescriptions.

P: Okay. Tylenol with codeine, penicillin and the what?

M: Fiorinal.

P: Fiorinal. And that's it?

M: That's correct.

Ms. Morris now states that she perjured herself at trial. The district court ruled that the doctrine of judicial estoppel precludes her from subsequently changing her story.

As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litiga-

tion. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991); *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 56 (1990); *Stevens Tech. Servs. v. SS Brooklyn*, 885 F.2d 584, 588 (9th Cir. 1989). Although this circuit has adopted the doctrine of judicial estoppel, we have not yet determined the circumstances under which it will be applied. *See Milgard Tempering, Inc.*, 902 F.2d at 716; *Stevens Tech. Servs., Inc.*, 885 F.2d at 589. The majority of circuits recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation; only in that situation, according to those circuits, is there a risk of inconsistent results and a threat to the integrity of the judicial process. *See Milgard Tempering, Inc.*, 902 F.2d at 716 (citing *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1981); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)); *Stevens Tech. Servs., Inc.*, 885 F.2d at 588-89. The minority view, in contrast, holds that the doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. *See Milgard Tempering, Inc.*, 902 F.2d at 716 (citing *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). In either case, the purpose of the doctrine is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Russell*, 893 F.2d at 1037 (quoting *Religious Tech. Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)).

[1] We need not decide in this case whether to adopt the majority or minority view regarding the applicability of the doctrine of judicial estoppel. In either instance, we would hold that Ms. Morris is not barred from asserting that she told

her attorney she had ingested methamphetamine prior to her arrest. No circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim of innocence, and we will not do so now. As noted above, the doctrine of judicial estoppel serves the function of preserving the integrity of the judicial process. In the context of a criminal proceeding where a defendant who claims to be innocent allegedly made untruthful statements solely because her attorney was ignorant of the law and told her incorrectly that telling the truth would constitute an admission of a crime, the integrity of the judicial process is best preserved by permitting the judiciary to consider her claim. Justice would not be served by holding the defendant to her prior false statements, and our concerns over compromising the "sanctity of the oath" must yield. *Cf. Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (judicial estoppel does not apply unless party was successful in getting first court to accept his position; simply recanting sworn testimony is insufficient). Ultimately, we exercise our discretion not to invoke an equitable doctrine where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant. Accordingly, we proceed to consider the merits of Ms. Morris's claim.

In support of her allegation that her attorney misinformed her as to the legality of methamphetamine use, Ms. Morris introduced two declarations — her own, and that of her trial counsel. In her declaration, she stated that she had ingested methamphetamine prior to her arrest, and that she had not ingested cocaine. She said that she had informed her trial counsel of that fact, and that he had told her "that being charged with being under the influence of methamphetamines was the equivalent to being charged with being under the influence of 'cocaine.' " The declaration of Ms. Morris's trial counsel makes identical representations. It states: "During the time that I represented both appellant and her husband, they both advised me that appellant was under the influence of methamphetamine and tylenol with codeine at the time of her

arrest in the within action. They both denied the allegation that she was under the influence of cocaine at the time of her arrest. These representations were made to me both before, during and after appellants [sic] trial in the within action. . . . I was of the opinion that being under the influence of methamphetamine or cocaine were each respectively, a violation of Health and Safety Code Section 11550. However, at no time prior to or during appellant's trial did I confirm that being under the influence of methamphetamine was described, or included in, or proscribed by Health and Safety Code Section 11550.[2] . . . I advised the appellant that since it was an offense to be under the influence of methamphetamine (even though it was not) she should not offer it as a defense to the charges of under the influence of cocaine."

[2] In order to demonstrate ineffective assistance of counsel, Ms. Morris must show, first, that counsel's performance was "deficient," and second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance requires "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Ms. Morris's allegations, if proven, would satisfy that two-part test.

First, assuming that the declarations are true, the performance of Ms. Morris's trial counsel was clearly deficient. Once she informed her attorney that she had been under the influence of methamphetamine, and not cocaine, he should have investigated and discovered that being under the influence of methamphetamine was not illegal at the time.[3] Addi-

[2]From the context of the statement it is clear that by saying that he did not "confirm" his opinion, counsel meant that he did not independently verify it. His statement clearly does not mean, as it might in some other context, that he did not confirm his initial view to his client a second time.

[3]Even if being under the influence of methamphetamine had been a crime at the time Ms. Morris was arrested, she was not charged with that

tionally, his advice to her that methamphetamine use and cocaine use were equally incriminating was far below any "objective standard of reasonableness." *See id.* at 688.

Second, if Ms. Morris's counsel had either been familiar with the law or done his homework and discovered that being under the influence of methamphetamine was not illegal, there is a reasonable probability that the outcome of the trial would have been different. Certainly, had counsel not been "deficient" in the performance of his duties, he would have directed Ms. Morris to testify fully as to the drugs she had ingested prior to her arrest. Then he could have presented expert testimony showing that the effects of methamphetamine use are nearly identical to those of cocaine use. Combined with the complete absence of any physical evidence showing cocaine use, this could well have raised a reasonable doubt in the jury's mind as to Ms. Morris's guilt. If the allegations set forth in the affidavits submitted by Ms. Morris are true, a court could not have confidence that the jury would have reached the result it did nor that the result is a reliable one. Thus, if the facts are as Ms. Morris asserts, she has established ineffective assistance of counsel under *Strickland*.

[3] Because the district court ruled that Ms. Morris was estopped from asserting that she had been under the influence of methamphetamine, it never inquired into the veracity of her

---

crime. Counsel for the State of California admitted at oral argument that it was extremely unlikely that a trial court would have allowed amendments to the complaint after the trial had already started because of the risk of violating the defendant's right to notice of the charges against her. Further, once tried on the charge of being under the influence of cocaine on the occasion in question, Ms. Morris could not have been tried again for the same act on different charges. This would have constituted double jeopardy. Thus, regardless of the legality or illegality of methamphetamine use, counsel's advice that Ms. Morris not raise her methamphetamine use as a defense to the charge of cocaine use was unquestionably seriously deficient.

allegations. We therefore remand for the district court to conduct an evidentiary hearing on the methamphetamine issue.

B. Conflict of Interest.

Ms. Morris next argues that her trial counsel had a conflict of interest because he was simultaneously defending her husband in an unrelated narcotics prosecution. Because of that conflict, she argues, her attorney decided not to call Mr. Morris to testify on her behalf. The result, she claims, was ineffective assistance of counsel.

Ms. Morris raised no objection at trial to her counsel's concurrent representation of her husband and herself. Therefore, in order to establish a Sixth Amendment violation based on a conflict of interest, she must show: (1) that her trial counsel actively represented conflicting interests, and (2) that an actual conflict of interest adversely affected his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Manhalt v. Reed*, 847 F.2d 576, 579 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988).

[4] Ms. Morris cannot satisfy her burden. The mere possibility of a conflict of interest is insufficient to support a holding of ineffective assistance. Rather, "a defendant who raised no objection at trial must demonstrate that an *actual* conflict of interest adversely affected his lawyer's performance." *Id.* (emphasis added). An actual conflict must be proved through a factual showing on the record. *Willis v. United States*, 614 F.2d 1200, 1203 (9th Cir. 1979). As we have explained, "while we cannot indulge in nice calculations about the amount of prejudice which results from a conflict of interest . . . neither can we create a conflict of interest out of mere conjecture as to what might have been shown." *Id.* (quoting *Lugo v. United States*, 350 F.2d 858, 859 (9th Cir. 1965); citing *Carlson v. Nelson*, 443 F.2d 21, 22 (9th Cir. 1971)).

Ms. Morris's bare allegation of a conflict of interest is insufficient to entitle her to an evidentiary hearing on the question. In order to establish an actual conflict of interest she would have had to introduce, at a minimum, an affidavit from her husband disclosing what he would have said at her trial had he testified. She has introduced no evidence demonstrating that her husband's testimony might have been helpful to her, and that her attorney therefore faced a conflict of interest in determining whether to call him as a witness.[4] Although her brief on appeal is heavy with speculation as to the contents of his unsolicited testimony, her wishful suggestions cannot substitute for declaratory or other evidence. In the absence of any record evidence as to the existence of an actual conflict of interest, the district court was correct to reject her claim that such a conflict existed. *See Willis* 614 F.2d at 1203.

Under the circumstances of this case, including our conclusion that Ms. Morris's trial counsel faced no actual conflict of interest, counsel's decision not to call Mr. Morris as a witness provides no basis for a claim of ineffective assistance. At a bench conference, counsel explained his decision not to call Mr. Morris as follows:

> He [James Morris] has pending matters of his own and I feel that to put Mr. Morris on the stand would do precisely what [opposing] Counsel wishes it would do and that would open the door to other matters which are irrelevant to this proceeding but would be highly prejudicial to the defendant in this case.

That explanation, viewed in the context of his motion in

[4]Ms. Morris's counsel's affidavit did state that Mr. Morris told him that the defendant was under the influence of methamphetamine and not cocaine. However, it is clear that counsel would not have asked the husband to testify to that fact in any event because he thought that such testimony would be legally unavailing.

limine to exclude evidence of a prior arrest of Mr. and Ms. Morris,[5] demonstrates that counsel's decision not to call Mr. Morris was a tactical one; had he called Mr. Morris, the prosecution could possibly have linked him, and thereby Ms. Morris, to prior involvement with cocaine. In this instance, "[d]efense counsel's conduct and trial strategy appear to fall within the wide range of reasonable professional representation," and cannot be considered ineffective assistance. *See United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 979 (1985); *see also United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987).

C. Failure to Object to Admission of Evidence of Past Cocaine Use.

During Ms. Morris's cross-examination, the prosecutor asked her if she had ever used cocaine. Her trial counsel did not object. Ms. Morris answered that she had used cocaine once at a party six years earlier, when she was in high school, but that she had never seen or used cocaine since then. She asserts that her trial counsel's failure to object to the prosecutor's questions resulted in the admission of inadmissible and prejudicial character evidence against her. For purposes of discussion, we assume that the evidence was, in fact, inadmissible.

[5] An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective. As noted above, in order to establish ineffective assistance of counsel, a defendant must show that counsel committed "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A defendant seeking to prove ineffective assistance of counsel "must overcome the presumption that, under

[5]The motion was granted without prejudice to allowing the evidence later for purposes of impeachment.

the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

[6] Ms. Morris fails to overcome the presumption regarding sound trial strategy. Under the circumstances of her case, an effective advocate could have reasonably decided not to object to the prosecutor's questions. Ms. Morris's admission to a single instance of cocaine use six years earlier, when she was in high school, might well have bolstered her credibility with the jury and helped persuade it that she was not under the influence of cocaine on the night in question. Even if that turned out not to be the case, a tactical decision not to object would have been reasonable at the time it was made. We need not determine the actual explanation for trial counsel's failure to object, so long as his failure to do so falls within the range of reasonable representation. *See United States v. Molina*, 934 F.2d 1440 (9th Cir. 1991). Here, it clearly does. Accordingly, his failure to object did not render his representation ineffective.

III. CONCLUSION

Our holding that Ms. Morris is not judicially estopped from asserting that she was under the influence of methamphetamine rather than cocaine at the time of her arrest requires us to reverse the district court's denial of her habeas corpus petition and remand for an evidentiary hearing regarding that issue. We affirm the court's findings and conclusions as to the two other issues.

REVERSED AND REMANDED; FINDINGS AND CONCLUSIONS AS TO CERTAIN ISSUES AFFIRMED.

APPENDIX J

STATUTORY PROVISION

The applicable version of California Health and Safety Code section 11550 (1985 Cal.Stats., Chpt. 3, section 14, effective 1-29-85) read as follows:

> 11550. (a) No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) a narcotic drug classified in Schedule III, IV, or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days or more than one year in the county jail. The court may place a person convicted under this subdivision on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in the county jail.
>
> (b) No person shall use, or be under the influence of, any controlled substance which is specified in paragraph (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) of Section 11055, except when administered by or under the direction of a person licensed by the state to dis-

pense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 30 days nor more than one year in the county jail. The court may place a person convicted under this subdivision on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that the person be confined in the county jail for at least 30 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 30 days in confinement in the county jail.